

2009 BIENNIUM MAJOR LITIGATION CASES

LEGAL SERVICES DIVISION—JANUARY 29, 2007

1. Increases to base: The biennial major litigation appropriation provides funding for continuation of litigation efforts in existing cases and for cases yet to be filed in the upcoming biennium. The extent of the latter category of cases cannot be predicted. The following major litigation cases are ongoing and involve potential for significant increased expenditures in the 09 biennium:

PPL Montana v. State, Docket No. CDV 2004-846 (Montana First Judicial District, Lewis and Clark County) – This case involves Montana's claim to ownership of the bed and banks of navigable rivers underlying major hydropower dams in Montana. The case is scheduled for trial in FY 2008. Trial of the case will involve substantial discovery costs and expenses for expert witnesses.

National Wildlife Federation v. National Marine Fisheries Service, Civil Docket No. 01-640-RE (U.S. Dist. Ct., D. Or.) – This case involves the operation of the reservoirs in the Columbia River system, including the reservoirs behind Libby Dam and Hungry Horse Dam in Montana. The plaintiffs ask the court to require the adoption of operating plans that may have significant adverse effects on native endangered fish species in Montana and on other important state interests including recreation. The State intervened in the litigation and retained outside counsel. Substantial outside counsel fees will be incurred in the upcoming biennium.

Center for Biological Diversity v. U.S. Army Corps of Engineers, Docket No. CV 03-29-M-DWM (U.S. Dist. Ct., D. Mont.) – This is a related case to the National Wildlife Federation case discussed above. It involves maintaining operation of Libby Dam to protect endangered sturgeon populations in Montana. Because of the relationship between the two cases, the same outside counsel represents the state in both cases. Substantial counsel fees are expected in the 09 biennium.

ASARCO bankruptcy cases, Docket Nos. 05-21207, 05-21346, 05-21883, 05-21894 (U.S. Bankruptcy Ct., S.D. Tex.) – ASARCO operated numerous mining sites in Montana in addition to the East Helena lead

smelter. The State has multiple millions of dollars in environmental cleanup and natural resource damage claims against the ASARCO and its subsidiaries in these bankruptcy cases filed by ASARCO in 2005. The bankruptcy is filed in the federal bankruptcy court for the Southern District of Texas. The Attorney General has retained bankruptcy counsel admitted to practice before that court to represent the state's environmental interests in the cases. Substantial outside counsel costs and expert witness costs are expected in the 09 biennium.

State ex rel. McGrath v. Philip Morris, Docket No. CDV 1997-306 (Montana First Judicial District, Lewis and Clark County) – This is the original tobacco litigation filed by the State in 1997 which resulted in Montana's participation in the 1998 tobacco master settlement agreement. That agreement provides roughly \$25 million in payments to the state each year. In 2003 the tobacco companies initiated proceedings to attempt to reduce the amount of their payments due to a loss of market share to companies that did not join the settlement. The State filed a motion with the Court to protect the continued receipt of Montana's share of the settlement, seeking a declaration that Montana had diligently enforced its statutes to insulate Montana from the effect of the offset sought by the companies. The Attorney General retained outside counsel because the in-house lawyers familiar with the settlement were likely to be witnesses in the case. The tobacco companies are attempting to force the matter into a nationwide arbitration proceeding. Significant outside counsel expenditures are expected in the 09 biennium. If the companies succeed in driving the case into arbitration the cost of case will multiply substantially.

2. Yellowstone Basin water litigation: Montana is involved in two separate but related disputes with Wyoming over waters in the tributaries to the Yellowstone River that flow north out of Wyoming into Montana.

Montana v. Wyoming – This case, which will be filed in January, 2007, seeks to invoke the original jurisdiction of the United States Supreme Court to resolve a dispute between Montana and Wyoming over interpretation of the 1951 Yellowstone River Compact. Montana claims that Wyoming has allowed diversions of water that have resulted in reductions in the flow of the Tongue and Powder Rivers at the Montana border below levels to which Montana is entitled under the allocation provisions of the compact. In this specialized litigation the State has retained counsel experienced in litigation of original

jurisdiction matters before the United States Supreme Court and several outside consultants who may also serve as expert witnesses on the technical aspects of the case.

If the Court agrees to accept the case, it may or may not be resolved by June 30, 2009. Interstate water disputes filed in the Supreme Court frequently go on for many years.

Pennaco cases – Montana has been sued in two matters involving the application of Montana's water quality regulations in the Tongue and Powder River basins. We refer to the cases as Pennaco I and Pennaco II in reference to the oil company that is a plaintiff in both cases.

Pennaco I is filed in federal district court in Wyoming and seeks an order precluding EPA from approving Montana's 2003 water quality regulations adopted by the Board of Environmental Review. Pennaco II is filed in state court in Big Horn County and seeks to invalidate the 2003 rules and also additional regulations adopted in 2005. The State has retained expert consultants for these cases, and has retained local counsel in Pennaco I because court rules require that the State associate with an attorney admitted to practice in Wyoming. If these cases are litigated to conclusion they likely will not be resolved by June 30, 2009, given the length and course of the likely appeal process.

If the Court accepts original jurisdiction of the Montana v. Wyoming water quantity case, expenditures on these matters in the 09 biennium may well reach \$3 million. The Court usually refers original cases to a special court appointed "master" who presides over the fact-finding aspects of the case and makes a recommended decision (called a "report") to the Court. The parties then brief and argue the case and the court decides it. The master is usually a very experienced (and expensive) water lawyer, and the states divide up the master's fees and expenses equally in addition to paying their own counsel fees and expenses.